No. 88-1520

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MEDICAL MALPRACTICE INSURANCE ASSOCIATION,
Petitioner,

—against—

SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Introduction

This action challenges a determination of the respondent Superintendent pursuant to a temporary rate stabilization program enacted as one aspect of a comprehensive scheme adopted in the Medical Malpractice Reform Act of 1986, 1986 N.Y. Laws, ch. 266. Petitioner Medical Malpractice Insurance Association ("MMIA") seeks review of an order of the Court of Appeals of the State of New York dated December 15, 1988

(App. A at 15a),[1] which unanimously upheld the Superintendent's determination.

The challenged determination is set forth in amendments to the Superintendent's Regulation 101, 11 New York Codes, Rules and Regulations ("N.Y.C.R.R.") § 70.8 *et seq.* (App. G). The mandate to the Superintendent to implement a temporary rate stabilization program (1986 N.Y. Laws, ch. 266, §§ 1, 40) complemented numerous and significant reforms designed to prevent instances of medical malpractice and assure that both malpractice verdicts and litigation costs are reasonable. 1985 N.Y. Laws, ch. 294; 1986 N.Y. Laws, chs. 266, 682.

The Court of Appeals held that the Superintendent's interpretation of section 40 of the 1986 Act was reasonable and that the rates set pursuant to that interpretation were not arbitrary or capricious. The Court further held that MMIA's allegation that the Superintendent's interpretation would result in a confiscation of property in violation of the Fifth and Fourteenth Amendments of the United States Constitution, as well as parallel provisions of the New York State Constitution, would not lie, given that MMIA is "a creature of statute" that is separate and distinct from its members. (App. A).

In its petition to this Court, MMIA challenges the Court of Appeals' holding that the Superintendent's interpretation of section 40 of the 1986 Act does not violate the Fifth and Fourteenth Amendments of the United States Constitution. As will be shown, the petition should be denied because MMIA is not an entity which can properly advance a claim under the Takings Clause of the United States Constitution, its claim is not yet ripe for adjudication, and the temporary rate stabilization program adopted pursuant to section 40 is both reasonable and non-confiscatory. Indeed, contrary to the suggestions in the briefs of petitioner and *amicus curiae*, section 40 is designed to guarantee adequate rates through a system of surcharges, the

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1 "App." denotes the Appendix to the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York. "A." denotes the Appendix in the Appellate Division, First Department, of the Supreme Court of the State of New York.

imposition of which will become mandatory should actuarial deficits be projected for the policy years in question.

Statement Of The Case

The Superintendent adopts section I of the opinion of the Court of Appeals (App. A at 2a-6a) as his statement of the case with respect to all matters prior to the Court of Appeals' decision. As that court noted, the Appellate Division of the Supreme Court of the State of New York affirmed, by a 3 to 2 vote, the decision of the trial court rejecting a referee's report and setting aside the Superintendent's rate determinations.

The Court of Appeals unanimously reversed the decision of the Appellate Division. It held that the Superintendent's consideration of future surcharges in setting rates for the 1985-1988 policy years reflected a reasonable interpretation of the relevant statutory provisions and that the rates he had set pursuant to that interpretation were not arbitrary or capricious and were rationally based on actuarial data. (App. A at 2a, 9a-11a).

The court rejected MMIA's argument that the Superintendent's interpretation was arbitrary because it would require MMIA to run at a deficit for an unreasonable length of time. It noted that any actuarially projected deficiency ultimately attributed to restrained rates for the 1985-88 period would be recouped by the surcharges within 15 years, and that MMIA would remain liquid throughout this period, *i.e.*, able to pay claims as they came due, by virtue of the established rates in combination with 8% surcharges after 1989. (App. A at 12a). The court further observed that given the tort reforms enacted in 1985 and 1986, and the uniquely long-tailed nature of medical malpractice claims, this result was "entirely reasonable." (App. A at 12a).

The court also held that requiring MMIA to operate under an actuarially projected deficit was not confiscatory, because:

> MMIA is a creature of statute, and all of its rights, obligations and duties have been defined by the Legislature (*see*,

> Insurance Law art 55). MMIA may operate only for fixed periods of time and only if the Superintendent determines that medical malpractice insurance is not readily available in the voluntary market (Insurance Law § 5502[d]). In addition, MMIA's operations are subject to the Superintendent's extensive and direct control (Insurance Law § 5503[c]). Importantly, although all insurance companies writing personal injury insurance in New York are required to be members of MMIA as a condition of transacting business in this State (Insurance Law § 5502[a]), MMIA is a nonprofit unincorporated association which is a legal entity separate and distinct from its members (Insurance Law § 5502[b]). Moreover, all funds and reserves of MMIA are held and invested separately from its members (*id.*).

72 N.Y.2d 753, 766.[2]

The court observed that "deficits were expressly contemplated in the enabling legislation (Insurance Law §§ 5507, 5509)." 72 N.Y.2d at 766. (App. A at 13a). The court thus concluded that

> even if MMIA will operate at a continued loss, such a loss is not confiscatory vis-à-vis MMIA (*see, Brooks-Scanlon Co. v. Railroad Commn.*, 251 US 396, 399 ["It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfil an obligation imposed by the charter, even though fulfilment in that particular may cause a loss."]; *Missouri Pac. Ry. Co. v. Kansas*, 216 US 262, 276, 278); *Atlantic Coast Line v. North Carolina Corp. Commn.*, 206 US 1).

Id.

Regarding MMIA's suggestion, raised for the first time in its brief to that court, that the rates set by the Superintendent

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2 There is a typographical error in this quotation as it appears in the appendix to the petition. (App. A at 13a). The first reference to section 5502[d] is transcribed there as 5505[d].

would violate the rights of MMIA's members, as opposed to MMIA itself, the court observed that these members had never been made parties to the instant proceeding and that their claims were the subject of a separate action in federal court. That action, *Alliance of American Insurers v. Cuomo*, 87 Civ. 0169 (Patterson, U.S.D.J.), has been held to be justiciable, 854 F.2d 591 (2d Cir. 1988), and is now pending in the United States District Court for the Southern District of New York. Extensive discovery is underway. The Court of Appeals, accordingly, declined to consider that argument. (App. A at 13a-14a).

REASONS FOR DENYING THE WRIT

POINT I

MMIA HAS FAILED TO DEMONSTRATE THAT AN ENTITY OF ITS NATURE CAN ASSERT A TAKING CLAIM

By this petition, MMIA seeks to challenge a decision of the Court of Appeals of the State of New York which held, *inter alia*, that the very nature of MMIA precludes its assertion of a taking claim. The court noted that Article 55 of the Insurance Law—MMIA's legislative charter—makes no mention of any return on investment and explicitly provides that MMIA is a non-profit association. Indeed, MMIA is composed of liability insurers, as a compulsory condition of their doing business in New York, rather than investors expecting to fulfill a legislative promise of a reasonable return (compare New York Public Service Law § 72). The possibility of actuarial deficits was clearly contemplated as part of the legislative scheme. *See* Insurance Law § 5502(a), (b) ("The association shall be a non-profit unincorporated association constituting a legal entity separate and distinct from its members"); §§ 5507, 5509 (stabilization reserve fund created to pay MMIA any deficit or reimburse MMIA members for payment of their allocated shares of MMIA deficits). In contrast to a proprietary business or a public utility, MMIA may legally operate only for fixed periods and only if the Superintendent determines that medical malpractice

insurance is not readily available in the voluntary market. Insurance Law § 5502(d). And MMIA's operations are subject to the Superintendent's extensive and direct control. Insurance Law § 5503(c). Thus, the Court of Appeals saw little resemblance in MMIA to an investment-backed enterprise aggrieved by confiscatory rates.

The threshold issue presented by this petition is whether there is a conflict between the Court of Appeals' decision and any decision of this Court or another appellate court or, alternatively, whether the decision presents an important federal question that should be resolved by this Court. None of the Supreme Court or other cases MMIA cites even addresses the question of whether regulation can effect a taking as to an association like MMIA, or whether such an association may present the claims of non-party members.[3] Moreover, given that individual members have the right to challenge the regulatory scheme, and that such litigation is, in fact, pending, MMIA has not demonstrated that it is important for this Court to resolve that question. Thus, MMIA has failed to make the requisite showing.

The insuperable obstacle to MMIA's taking claim is that it cannot properly be evaluated without measuring the impact of the rates on the individual insurers which comprise MMIA, as opposed to the association itself. This Court's recent decision in *Duquesne Light Co. v. Barasch*, 109 S.Ct. 609, 619 (1989), teaches that only rate-making with a confiscatory impact is unconstitutional. In assessing the economic impact of a regulation, moreover, the value of the complainant's property interest in the enterprise, and its investment-backed expectations of a profit, are central considerations. *Williamson County Regional*

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3 *California State Automobile Association v. Maloney*, 341 U.S. 105 (1951), involved an assigned risk plan allocating less desirable applicants among all insurers doing auto insurance business in the state. The plaintiff there was merely one of the insurers. Although it was, in fact, "an unincorporated association" analogous to a mutual insurance company, *id.* at 106, it had been formed voluntarily, by its members, "to write automobile insurance to a select group of members at a lower cost than the prevailing rate," *id.*, and thus was not a "creature of statute" like MMIA, which has a legal identity separate and distinct from its members (Insurance Law § 5502(b)).

Planning Commission v. Hamilton Bank, 473 U.S. 172, 191 (1985). *Accord Keystone Bituminous Coal Association v. De Benedictis*, 107 S.Ct. 1232, 1246-1248 (1987); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986). Since MMIA, as a creature of statute, does not itself have any "investment-backed expectations," it is only by showing the impact of the rates here on its members that MMIA could conceivably demonstrate that such rates are confiscatory.

MMIA, however, made no attempt in its petition pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR")[4] to assert the claims of its members (A. 26-40, 137-54, 172-87, 275-94), and the record is silent as to the impact of the Superintendent's application of section 40 on MMIA members' businesses. Indeed, MMIA did not purport to advocate on its members' behalf until it filed its brief in response to the Superintendent's appeal to the Court of Appeals. Moreover, it failed to demonstrate, even then, why it should be permitted to assert claims on its members' behalf. In fact, under governing standards, it has no such right.

In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), this Court set forth the test to be applied in determining whether a trade association has standing to sue on behalf of its members. The entity has standing "when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. *Accord*, *New York State Club Association v. City of New York*, 108 S.Ct. 2225, 2232 (1988). Advocating on behalf of its members is not germane to the existence of MMIA, as its purpose is defined under Article 55, and in contrast to a trade association. More fundamentally, MMIA cannot meet the third part of the *Hunt* test because it cannot establish that the rates here are confiscatory as to its members without their participation. Even if MMIA theoreti-

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4 Article 78 establishes a mechanism for obtaining relief in the nature of writs of certiorari to review, mandamus, or prohibition from governmental bodies or officers. CPLR § 7801.

cally could have asserted claims on behalf of its members, the record before the Court of Appeals was utterly inadequate to establish any such claim. Indeed, despite repeated references by petitioner and *amicus curiae* to MMIA's alleged existing deficit, the record is devoid of any evidence that MMIA's members have ever been assessed with regard to that deficit.

As noted above, MMIA's members are presently seeking relief in a separate action, now pending in the United States District Court for the Southern District of New York, *Alliance of American Insurers v. Cuomo*, 87 Civ. 0169 (Patterson, U.S.D.J.). Extensive discovery is taking place in that action, and it represents a far more appropriate vehicle for the adjudication of members' claims. As demonstrated in Point III below, the Court of Appeals' evaluation of MMIA's taking claim here is fully consistent with *California State Automobile Association v. Maloney*, 341 U.S. 105 (1951), and recent rate cases decided by this Court, including *Duquesne*. As there is no special or important reason for the Court to exercise jurisdiction over this case, the Court need not take this occasion to revisit *Duquesne*, *Maloney* and other taking authorities.

POINT II

MMIA'S CLAIM THAT THE SUPERINTENDENT'S RATES ARE CONFISCATORY IS NOT YET RIPE FOR REVIEW IN AN ARTICLE III COURT

MMIA's constitutional challenge to section 40 rests on the assumption that the base rates adopted by the Superintendent for the 1985 through 1988 policy years will result in actuarially projected deficiencies for these years despite the tort reforms enacted in 1985 and 1986. MMIA asserts that these rates, therefore, will effect a taking. Even if MMIA could ever assert such a claim, it is premature here under the ripeness doctrine applied by this Court pursuant to Article III of the Constitution and prudential considerations. *See New York State Club Association v. City of New York*, 108 S.Ct. 2225, 2231 n.2 (1988). MMIA's claim is unripe both because it is not yet known

whether actuarial deficiencies will be projected and because MMIA, by operation of section 40, will, in fact, be compensated for any such actuarially projected deficiencies before they become actual dollar shortfalls. Although the Superintendent declined, at the hearing below, to present evidence that the 1985-88 rates would be adequate without the surcharges, he has never conceded that the base rates are inadequate. The projection as to the existence or non-existence of an actuarial deficit for these policy years has not yet occurred; when it does occur, the rates may prove to be adequate.

As noted by the Court of Appeals, one of the purposes of the 1986 Act was to " 'provide a measure of badly needed premium stability' " as the comprehensive tort reforms enacted in 1985 and 1986 began to take effect. In general, the Superintendent was to set rates pursuant to the same standards previously applied to insurers' filings.[5] There was one difference, however. The surcharges would be deemed to be "income earned" for the purposes of Insurance Law § 2303, which requires that all income earned be included in determining whether rates comply with the statutory requirements of solvency. Thus, the surcharges were to be treated similarly to projected investment income. Only the experience of the next few years will establish whether the rates set for 1985-88 will in fact result in actuarially projected deficiencies for these years, even after the impact of the 1985 and 1986 legislation has been felt. Early indications, however, suggest that this impact may be substantial and favorable. *See Malpractice Bills Stalled by Drop in Suits*, N.Y.L.J., April 25, 1989, at 1, col. 3 (noting that the number of medical malpractice suits filed annually in New York courts has declined by 70% since 1986).

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5 In the period from 1975 until 1985, applicable premium rates were set pursuant to proposals filed by MMIA and other insurers. The Superintendent's role was merely to approve these filings, if they were in compliance with applicable rating standards. These standards required that rates be set at the lowest possible level consistent with solvency and the establishment of reasonable reserves and surpluses. Insurance Law §§ 2303, 5505(a), (b). Nevertheless, MMIA's rates were permitted to increase by more than 200% between 1980 and 1985. (A. 1153-1154).

In *Pennell v. City of San Jose*, 108 S.Ct. 849, 857 (1988), this Court held that the mere fact that a particular outcome is conceivable "does not present a sufficiently concrete factual setting for the adjudication of [a] takings claim." The Court further observed that "[g]iven the 'essentially ad hoc, factual inquir[y]' involved in the takings analysis, . . . we have found it particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.' " *Id.* at 856.

Even if deficiencies had already been projected here, the taking claim would not yet be ripe. Contrary to the suggestion in the briefs of the petitioner and *amicus curiae* American Insurance Association ("AIA"), compliance by the Superintendent with the terms of section 40 is not in any sense permissive. Section 40 states that "the superintendent *shall* impose a surcharge on premiums *to satisfy* any actuarially projected deficiency that is attributable to the premium levels established pursuant to this section . . . ." (Emphasis supplied). The Court of Appeals clearly understood section 40 to require the imposition of appropriate surcharges, guaranteed to offset these deficiencies before MMIA experiences any actual dollar loss.[6] (App. A at 12a). No action by MMIA or its members is necessary to make this requirement operative, and the suggestion that the Superin-

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6 AIA's suggestion, at page 9 note 8 of its brief, that the Superintendent may select the timing and the amount of such surcharges at whim is also contrary to the plain meaning of the statute and its interpretation by the Court of Appeals. Moreover, the 1988 amendments to section 40 explicitly require that projected deficiencies be satisfied within a reasonable time period, and increased the maximum surcharge to 25%, beginning in the 1991-92 policy year, and continuing until any deficiencies have been recouped, in order to ensure that result. 1988 N.Y. Laws, ch. 184, § 19; 1988 N.Y. Laws, ch. 186. The text of the 1988 amendments is set forth in an appendix to this brief. Were the Superintendent to delay imposing a required surcharge, or to impose less than the amount required to ensure an adequate rate, that failure would be actionable, as unreasonable, under Article 78. CPLR § 7801 *et seq.* Similarly, were the Superintendent to impose a surcharge on an inadequate base rate, the inadequacy of the base rate would itself be actionable.

tendent will ignore his duty is purely speculative. As this Court observed, in upholding a state licensing statute, in *New York ex rel. Lieberman v. Van De Carr*, 199 U.S. 552, 562 (1905), "[t]here is no presumption that the power will be arbitrarily exercised . . . ."

Moreover, even if the Superintendent were to fail to comply with his statutory obligation, MMIA would have a remedy. An Article 78 proceeding in the nature of mandamus could be commenced to compel him to take appropriate action.[7] Any constitutional claims MMIA might then possess could also be adjudicated in such a proceeding. As of today, however, MMIA's claim is premature. As this Court observed in *Williamson County Regional Planning Commission v. Hamilton County*, 473 U.S. 172, 194-195 (1985):

> The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. [264], at 297, n. 40. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a " 'reasonable, certain and adequate provision for obtaining compensation' " exist at the time of the taking. . . . If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking. . . . [I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation

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7 MMIA never judicially challenged the adequacy of any of the rates set between 1975 and 1985. In fact, in 1985, MMIA joined with the Superintendent in defending a 42% rate increase, approved by the Superintendent, from a challenge by a physician policyholder. *Schwartz v. Corcoran*, 118 A.D.2d 355, 505 N.Y.S.2d 401 (1st Dept. 1986). Moreover, MMIA declined to collect a substantial portion of the rate increase authorized for the 1981-82 policy year. (A. 1156-1158).

> Clause until it has used the procedure and been denied just compensation.

Given that no deficits have as yet been projected, that section 40 guarantees adequate compensation for any actuarially projected deficiencies which may subsequently arise, that the State has provided a mechanism to compel the Superintendent's compliance with that guarantee, and that MMIA has not yet had occasion to even use that procedure, let alone be denied compensation, its claim here is not yet ripe.

POINT III

THE RATES ARE CLEARLY REASONABLE AND NON-CONFISCATORY UNDER THE DECISIONS OF THIS COURT

Even if MMIA could assert a taking claim, and the claim were deemed ripe for review in an Article III court, MMIA's argument that the Superintendent's application of section 40 is confiscatory runs counter to numerous decisions of this Court rejecting similar constitutional attacks on remedial or rate-making legislation, even when mounted by profit-making enterprises.

In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), for example, this Court dismissed a taking claim, holding that even government regulation which required a proprietary company to subsidize others without compensation was constitutional.

> [A]ppellants' submission—that such a statutory liability to a private party always constitutes an uncompensated taking prohibited by the Fifth Amendment—if accepted, would prove too much. In the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to

> regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.

475 U.S. at 222-23. *See also Keystone Bituminous Coal Association v. De Benedictis*, 107 S.Ct. 1232, 1244-45 (1987); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

More recently, in *Duquesne Light Co. v. Barasch*, 109 S.Ct. 609, 619 (1989), the Court rejected a challenge under the Takings Clause to rates set pursuant to a statutory amendment requiring previously recognized costs to be excluded from the rate base, observing:

> The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The *Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other aspect.*

(Emphasis supplied). *See also Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968).

MMIA's taking claim is doomed, in part, because it is based on the false premise that the rates adopted by the Superintendent are "inadequate." As noted previously, however, section 40 does not contemplate that MMIA will suffer actual dollar losses from actually paid claims; the statutory surcharges are intended to prevent that adversity. Thus, the referee who conducted the trial, in rejecting MMIA's due process argument, found that the Superintendent's application of section 40 would not cause MMIA to become insolvent. As he stated: "Section 40 does not purport to require the fixing of inadequate rates." (A. 209, 233). Similarly, the Court of Appeals, after consider-

ing the extensive record in this case, held that the Superintendent properly treated the future surcharges as income and concluded that base rates with the surcharges would be adequate and reasonable.

Section 40 comprises but one component of comprehensive reform legislation, enacted in 1985, 1986 and 1988, that in a wide variety of ways would *decrease* insurance companies' exposure, by limiting attorney's fees and joint and several liability, requiring recognition of collateral sources of compensation, authorizing periodic payments of damages, mandating physician privilege review procedures, authorizing penalties for frivolous suits, encouraging voluntary arbitration, and tightening appellate scrutiny of malpractice verdicts. Moreover, authorized surcharges would, if needed, also provide MMIA with premiums commensurate with its risks—a factor this Court viewed as relevant to the constitutionality of a California scheme to provide automobile insurance by spreading risks among all auto insurers doing business there. *California State Automobile Association v. Maloney*, 341 U.S. 105, 108 (1951). Thus, here, as in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. at 225-26, the stabilized rates complement "a significant number of provisions . . . that moderate and mitigate" the frequency and severity of claims against MMIA.

Significantly, this Court has repeatedly emphasized the wide latitude which states enjoy to regulate insurance under their police power within constitutional constraints. In upholding the California assigned risk scheme in *Maloney*, the Court rejected the plaintiff insurance association's constitutional objections, 341 U.S. at 109-11, stating:

> The case in its broadest reach is one in which the state requires in the public interest each member of a business to assume a *pro rata* share of a burden which modern conditions have made incident to the business. It is therefore not unlike *Noble State Bank v. Haskell*, 219 U.S. 104, which sustained a state law assessing each state bank for the creation of a depositors' guaranty fund. *What was there said about the police power—that it "extends to all the great*

> *public needs" and may be utilized in aid of what the legislative judgment deems necessary to the public welfare* (p. 111)—*is peculiarly apt when the business of insurance is involved—a business to which the government has long had a "special relation."* See *Osborn v. Ozlin*, 310 U.S. 53, 65, 66. Here, as in the banking field, the power of the state is broad enough to take over the whole business, leaving no part for private enterprise. *Mountain Timber Co. v. Washington*, 243 U.S. 219; *Osborn v. Ozlin, supra*, p. 66. The state may therefore hold its hand on condition that local needs be serviced by the business.
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> *Appellant's business may of course be less prosperous as a result of the regulation. That dimunition in value, however, has never mounted to the dignity of a taking in the constitutional sense.* See *Noble State Bank v. Haskell, supra*, p. 110; *Block v. Hirsh*, 256 U.S. 135.

(Emphasis supplied, footnotes omitted).

Similarly, Justice Frankfurther, speaking for the Court in *Osborn v. Ozlin*, 310 U.S. 53 (1940), noted, in rejecting a due process attack, the unique nature of states' regulation of insurance.

> Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates, *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389; it may regulate the compensation of agents, *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251; it may curtail drastically the area of free contract, *National Ins. Co. v. Wanberg*, 260 U.S. 71.

310 U.S. at 65-66 (footnote omitted).

MMIA's taking argument fails because it disregards the essential nature of MMIA, the factual record before the Super-

intendent, and applicable legal standards. Neither MMIA nor its members can point to a statutory or regulatory provision affording it a property interest in any particular rate or even in obtaining a favorable return, and the Court of Appeals correctly concluded that Article 55 did not confer one. *See, e.g., Turnquist v. Elliott*, 706 F.2d 809 (7th Cir. 1983) (no property interest in being paid prevailing wage rate); *Federal Housing Administration v. Darlington, Inc.*, 358 U.S. 84, 91-92 (1958) (no vested right in existing regulatory scheme); *Chicago & Alton Railroad v. Tranbarger*, 238 U.S. 67, 76 (1915). Nothing in the record before the Court of Appeals revealed the impact of the premium rates at issue here on MMIA's members or the rates of return on their investments in the insurance industry. Moreover, nothing in *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920), upon which petitioner seeks to draw support, suggests that the significant differences between a proprietary enterprise and MMIA—a non-profit entity created by the Legislature and terminable by the Superintendent, implementing the State's broad police power to foster affordable medical malpractice coverage, with the possibility of MMIA's deficits expressly contemplated in the enabling legislation (Insurance Law §§ 5507, 5509)—should be ignored.

Moreover, as the Court of Appeals correctly observed, Justice Holmes explicitly stated in that very opinion that even commercial enterprises, acting through powers conferred by state charter, may be compelled "to fulfil an obligation imposed by the charter even though fulfilment in that particular may cause a loss." 251 U.S. at 399. Indeed, in *Atlantic Coast Line Railroad v. North Carolina Corporation Commission*, 206 U.S. 1 (1907), the Court upheld such a directive, observing that "as the primal duty of a carrier is to furnish adequate facilities to the public, that duty may well be compelled, although by doing so as an incident some pecuniary loss from rendering such service may result," *id.* at 26. *See also Missouri Pacific Railway v. Kansas ex rel. Railroad Commissioners*, 216 U.S. 262, 279 (1910).

Although MMIA now contends that this rule should only apply when an entity participates in an enterprise voluntarily,

there is no principled basis for such a distinction. The *Atlantic Coast* Court observed that "[a]s the duty to furnish necessary facilities is coterminous with the powers of the corporation, the obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance." 206 U.S. at 27. The record here reflects that the nature of MMIA is non-profit and that its central purpose is to serve the public interest by assuring a market for medical malpractice insurance. Article 55 of the Insurance Law requires MMIA "to fulfill an obligation" to provide critically needed insurance at the lowest rates possible, even though an actuarially projected deficit may result. The surcharges, however, are expressly designed to satisfy any such deficit without MMIA suffering an actual financial loss. Unlike a company whose investors must absorb deficits resulting from arbitrary rates, therefore, it is MMIA's *customers* who will be required to amortize any deficits resulting from section 40 through the premium surcharges. The Court of Appeals thus correctly concluded that MMIA could be required to fulfill its statutory obligation to offer rates as low as possible without running afoul of the Takings Clause. Moreover, MMIA's members are free to withdraw from MMIA if they regard their participation in it as too burdensome, although they will lose the privilege of writing personal injury insurance within the state as a consequence.

Even in the context of rates for profit-making enterprises, courts have sustained temporary remedial measures that were actually more restrictive than section 40. In *Whitney v. Heckler*, 780 F.2d 963 (11th Cir.), *cert. denied*, 479 U.S. 813 (1986), for example, the Eleventh Circuit upheld a thirty-three month freeze on Medicare rates, enabling Congress to study possible reforms in the Medicare system while the rates were thus stabilized. Significantly, a study of medical malpractice and the many legislative reforms in New York is now ongoing at Harvard University.

Evaluated in this context, it is clear that the rates set by the Superintendent were rationally related to a legitimate state

interest and thus consistent with due process as well. Just as MMIA cannot show a legitimate claim of entitlement to a favorable rate of return in the Insurance Law, so it cannot show any irrationality in the Superintendent's determinations—however unpalatable they may be to MMIA temporarily.

The Superintendent, relying on expert actuaries, had ample warrant to conclude that the rates he set, together with future surcharge income, would provide this non-profit insurer with sufficient premiums to pay claims and expenses, as well as amortize any resulting actuarially projected deficit during the uniquely long period in which MMIA would pay claims. In the interim, these rates were reasonably intended to stabilize otherwise soaring increases in the short term and to permit numerous tort reforms an opportunity to have an impact in the long term. Those are exactly the type of "pragmatic adjustments" which this Court has held an administrator is entitled to make. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942).

MMIA's skepticism concerning the wisdom of the tort reforms enacted is irrelevant, given the availability of surcharges to ensure an adequate rate. As this Court established in *Duquesne Light Co. v. Barasch*, 109 S. Ct. at 617, quoting *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944), "[i]f the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end." Thus:

> [A]n otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it. "It is not theory, but the impact of the rate order which counts." *Hope*, 320 U.S., at 602, 64 S.Ct., at 288.

Duquesne Light Co. v. Barasch, 109 S.Ct. at 619. *See also Pennell v. City of San Jose*, 108 S.Ct. 849, 857 (1988). Similarly, MMIA's and AIA's musings concerning the likely ramifications of the Court of Appeals' decision are mere policy arguments and ignore the teaching of this Court that policy is the province of legislatures. *Osborn v. Ozlin*, 310 U.S. at 66.

MMIA has itself adopted an unreasonable position in now seeking to invalidate the one statute that requires any deficit to be fully amortized. The statutory scheme in force from 1975-85 contained no guarantee of an adequate rate. Moreover, the Insurance Law provisions then in effect resulted, MMIA now says, in rates that were all inadequate. Nevertheless, MMIA apparently had no constitutional qualms concerning the prior statute. Indeed, MMIA declined to collect all the increases which were approved.

The provisions in effect from 1975 to 1985 merely gave the Superintendent the power to approve rates that MMIA proposed. The Superintendent now has both the power and the duty to impose surcharges, if the rates for 1985-88 result in actuarially projected deficiencies. Should it be necessary, MMIA can compel the Superintendent to perform his duty by means of an Article 78 proceeding. *See* CPLR § 7801 *et seq.* MMIA is fully familiar with the use of this mechanism having employed it against a prior Superintendent. *See Medical Malpractice Insurance Association v. Lewis*, 112 Misc.2d 103, 445 N.Y.S.2d 1013 (Sup. Ct. N.Y. Co. 1981), *aff'd*, 87 A.D.2d 571, 448 N.Y.S.2d 609 (1st Dept.), *appeal denied*, 56 N.Y.2d 506, 437 N.E.2d 1160, 452 N.Y.S.2d 1025 (1982). The provisions of section 40 accordingly provide MMIA with fuller guarantees of an adequate rate than it enjoyed under the prior statutory scheme.

Not one of the inapposite decisions in the rate-making area on which MMIA relies involved any provision comparable to the mandatory recoupment provision in section 40. Moreover, not one of them involved an instrumentality of the state's police power to regulate insurance and health care, with special public benefit obligations at the core of its creation. As noted above, MMIA is just such an entity.

MMIA's reliance upon *Hartford Accident & Indemnity Co. v. Ingram*, 290 N.C. 457, 226 S.E.2d 498 (1976), to demonstrate a conflict in authority, is misplaced. The question presented in that case was whether the legislature could constitutionally require general insurance companies to offer medical malprac-

tice insurance as a condition of doing business in the State. Neither MMIA nor any of its members has ever challenged the constitutionality of the 1975 legislation creating it, either in this litigation or in any prior proceeding.

Additionally, as noted by a federal court in distinguishing *Hartford Accident*, the challenged legislation there, in contrast to Article 55,

> required all general liability insurers to offer medical malpractice insurance. The statute forced insurers who had previously limited their business to property insurance, to enter the medical malpractice field, and thereby insure a generically different class of risk[;] the Court there based its holding on that ground and expressly left open the issue of whether the Act, if limited to accident and health carriers, would be upheld.

Insurers' Action Council, Inc. v. Markman, 490 F. Supp. 921, 926 (D. Minn. 1980), *aff'd*, 653 F.2d 344 (8th Cir. 1981) (*per curiam*). *See also Health Insurance Association v. Harnett*, 44 N.Y.2d 302, 312, 376 N.E.2d 1280, 1286, 405 N.Y.S.2d 634, 640 (1978). The legislative charter for MMIA is more comparable to the legislation upheld in *California State Automobile Association v. Maloney*, 341 U.S. 105. *See also Prudential Property and Casualty Insurance Co. v. Insurance Commission*, 699 F.2d 690 (4th Cir. 1983); *State Farm Mutual Automobile Insurance Co. v. Whaland*, 121 N.H. 400, 430 A.2d 174 (1981); *Sheeran v. Nationwide Mutual Insurance Co.*, 80 N.J. 548, 404 A.2d 625 (1979).

Finally, in *Hartford Accident*, the court's focus was the impact of the legislation upon the private insurance companies required to participate in the statutory scheme. In this action, in contrast—and contrary to petitioner's belated attempt to assert claims on behalf of its members—the only issue presented is whether section 40 is confiscatory as to MMIA. The Court of Appeals expressly left open the question of the statute's constitutionality as to MMIA members. Thus there is no "special" or "important" reason for this Court to grant the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
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Respectfully submitted,

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APPENDIX

1988 N.Y. Laws, ch. 184, § 19 and ch. 186

§ 1. Section forty of chapter two hundred sixty-six of the laws of nineteen hundred eighty-six amending the civil practice law and rules and other laws relating to malpractice and professional medical conduct, as amended by a chapter of the laws of nineteen hundred eighty-eight amending the civil practice law and rules and other laws relating to medical, dental and podiatric malpractice, as proposed in legislative bill numbers S. 9065 and A. 11840, is amended to read as follows:

§ 40. The superintendent of insurance shall establish rates for policies providing coverage for physicians and surgeons medical malpractice for the periods commencing July first, nineteen hundred eighty-five and ending June thirtieth, nineteen hundred ninety-one. The superintendent shall direct insurers to establish segregated accounts for premiums, payments, reserves and investment income attributable to such premium periods and shall require periodic reports by the insurers regarding claims and expenses attributable to such periods to monitor whether such accounts will be sufficient to meet incurred claims and expenses. On or after July first, nineteen hundred eighty-nine, the superintendent shall impose a surcharge on premiums to satisfy a projected deficiency that is attributable to the premiums levels established pursuant to this section for such periods; provided, however, that such annual surcharge shall not exceed eight percent of the established rate until July first, nineteen hundred ninety-one, at which time and thereafter such surcharge shall not exceed [eighteen] *twenty-five* percent of the approved adequate rate, and that such annual surcharges shall continue for such period of time as shall be sufficient to satisfy such deficiency. On and after July first, nineteen hundred eighty-nine, the surcharge prescribed by this section shall be retained by insurers to the extent that they insured physicians and surgeons during the July first, nineteen hundred eighty-five through June thirtieth, nineteen hundred ninety-one policy periods; in the event and to the extent physicians and surgeons were insured by another insurer during such periods, all or a pro rata share of the surcharge, as the case may

be, shall be remitted to such other insurer in accordance with rules and regulations to be promulgated by the superintendent. Surcharges collected from physicians and surgeons who were not insured during such policy periods shall be apportioned among all insurers in proportion to the premium written by each insurer during such policy periods; if a physician or surgeon was insured by an insurer subject to rates established by the superintendent during such policy periods, and at any time thereafter a hospital, health maintenance organization, employer or institution is responsible for responding in damages for liability arising out of such physician's or surgeon's practice of medicine, such responsible entity shall also remit to such prior insurer the equivalent amount that would then be collected as a surcharge if the physician or surgeon had continued to remain insured by such prior insurer. In the event any insurer that provided coverage during such policy periods is in liquidation, the property/casualty insurance security fund shall receive the portion of surcharges to which the insurer in liquidation would have been entitled. The surcharges authorized herein shall be deemed to be income earned for the purposes of section two thousand three hundred three of the insurance law. The superintendent, in establishing adequate rates and in determining any projected deficiency pursuant to the requirements of this section and the insurance law, shall give substantial weight, determined in his discretion and judgment, to the prospective anticipated effect of any regulations promulgated and laws enacted and the public benefit of stabilizing malpractice rates and minimizing rate level fluctuation during the period of time necessary for the development of more reliable statistical experience as to the efficacy of such laws and regulations affecting medical, dental or podiatric malpractice [taken] *enacted or promulgated* in nineteen hundred eighty-five, nineteen hundred eighty-six, by this act and at any other time. Notwithstanding any provision of the insurance law, rates already established and to be established by the superintendent pursuant to this section are deemed adequate if such rates would be adequate when taken together with the maximum authorized annual surcharges to be imposed for a reasonable period of time whether or not

any such annual surcharge has been actually imposed as of the establishment of such rates.

§ 2. This act shall take effect on the same date as such chapter of the laws of nineteen hundred eighty-eight takes effect.